Supreme Court of the United States

October Term, 1976

No. [illegible] 76

Fernando R. Escuté, *Petitioner*,

v.

Gerardo Delgado, Warden, Penitentiary of Puerto Rico, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1693

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is set out as Appendix B, page A 8, to the Petition. The Opinion and Order of the United States District Court for the District of Puerto Rico is printed as Appendix A, page A 1, to the Petition.

JURISDICTION

The jurisdictional requisites under 28 U.S.C. § 1254 (1) and Rule 19(1)(b) of the Rules of this Court are not met by this Petition.

QUESTION

Was the refusal, by the Supreme Court of Puerto Rico, while adopting the rule of law of *Escobedo* v. *Illinois* in Petitioner's 1965 petition to that Court, to apply that rule in Petitioner's case, a proper exercise of the Constitutional duties and rights of that Court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Constitutional and statutory provisions are set forth in the Petition at page 2.

STATEMENT

Petitioner was charged with and convicted of first degree murder arising out of a crime committed in 1943. A series of unsuccessful appeals and petitions followed all based on the constitutionality of a confession he made to a prosecuting attorney, who could also sit as magistrate under the then law of the Commonwealth of Puerto Rico.

Petitioner initially unsuccessfully appealed his conviction to the Puerto Rican Supreme Court. *People* v. *Rivera Escute,* 66 P.R.R. 207 (1946). He then sought a writ of habeas corpus in the Supreme Court of Puerto Rico, *Rivera Escute* v. *Delgado,* 80 P.R.R. 800 (1958), and appealed the denial of that Writ to the Court of Appeals for the First Circuit (the procedural route at that time), *Rivera Escute* v. *Delgado,* 282 F. 2d 335 (CA 1, 1960), *cert. denied,* 365 U.S.

883. Following this Court's decision in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), Petitioner initiated another unsuccessful petition for habeas corpus in the Supreme Court of Puerto Rico, *Rivera Escute* v. *Delgado,* 92 P.R.R. 746 (1965).

The instant Petition has its origin in a petition for a writ of habeas corpus filed on December 29, 1969, with the United States District Court for the District of Puerto Rico. This was denied on June 23, 1970 (see Appendix A to Petition) and appeal was taken to the United States Court of Appeals for the First Circuit. That Court's opinion, which is set out at Appendix B to the Petition, stated:

> The authority of the Puerto Rican Supreme Court to give only prospective effect to its rulings is dependent on the power granted that court by the Puerto Rican constitution, and that court is the authoritative interpreter of that constitution. We may sympathize with petitioner who has urged the issue of right to counsel at interrogations for so many years only to be denied the benefits of his efforts, but we cannot say that the Puerto Rican Supreme Court had no authority to issue a prospective ruling.

ARGUMENT

Petitioner has been ably represented by the same counsel since his initial criminal trial. That counsel, in the 1943 criminal trial, raised the defense that petitioner made a confession to a prosecuting attorney, acting as magistrate under the then Puerto Rican law,[1]

[1] The statute authorizing this procedure is set out at page 2 of the Petition. It has since been repealed. Constitution of the Commonwealth of Puerto Rico, Article II, Section 10; *Lopez* v. *Superior Court,* 79 P.R.R. 470 (1956).

without the benefit of what has become known as the "Escobedo warning",[2] that is, being advised of his rights to counsel before submitting to interrogation. It is worthwhile to mention at this point that petitioner was told of his right to remain silent and that any statement he made could be used at trial; the only warning required at that date. It is evident from the record that Petitioner's repeated attempts to retroactively apply the Puerto Rican Supreme Court's adoption of the "Escobedo doctrine", persuaded upon that court by Petitioner in his 1965 case, stems from his raising the issue in 1943 and preserving it for appeal at that time. However, it is obvious that the courts presented with this issue following the criminal trial were not ready to adopt the "Escobedo doctrine" in the 1940's and 1950's (see Opinion of the First Circuit at p. A 9 of Petition). In fact, it took this honorable Court until 1964 to establish the "Escobedo warning". Respondent does not argue that it might not have been more timely established in the instant matter in 1943. The simple truth is that it was not. This Petition then boils down to whether or not the Supreme Court of Puerto Rico had the authority, in adopting the "Escobedo doctrine" in Petitioner's 1965 presentation, to apply its adoption prospectively and deny its retrospective application to the Petitioner. Respondent agrees with the Courts below that the Puerto Rican Supreme Court indeed had this right. (See, pp. A 5 and A 10-11 of Petition). The right of a state to apply a ruling of its courts prospectively only is undisputed as conceded by petitioner in his brief to the U.S. Court of Appeals for the First Circuit.

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[2] *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

Petitioner urges the anomalous position that the Supreme Court of Puerto Rico is a federal court when it grants and decides on a writ of habeas corpus and is therefore bound by the principle that issues be resolved solely in concrete cases of controversy, but at the same time would have that court in the same habeas corpus proceeding acting as an independent jurisdiction in adopting a new ruling interpreting the Constitution of Puerto Rico in accordance with the *Escobedo* decision.

If we were to treat the 1965 proceeding as a regular federal district court habeas corpus appeal from a state action, then the court would be privileged to decide as this Court did in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966), not to apply this Court's decision in *Escobedo* retroactively to Petitioner whose case had long been finalized.

If, on the other hand, we accept, as this Court has uniformly done, the premise that *Escobedo* and similar decisions are not applicable to courts in Puerto Rico, but that these courts enjoy a special status neither state nor a part of the federal court system with the right and duty to interpret their own constitution, then we must accept the fact that the rule adopted in *Escute* v. *Delgado,* 92 P.R.R. 746 (1965), that the right to aid of counsel does exist in the investigative stage of a proceeding, is an independent judgment of the courts of the Commonwealth of Puerto Rico and like state decisions may be applied only prospectively if that court so decides.

Petitioner argues forcefully that his confession was coerced by the District Attorney, acting as committing magistrate, without affording Petitioner the right of

counsel durng the taking of such written confession, that Petitioner is of such low mental ability that he did not understand the warning regarding his right to remain silent and that any statement he made could be used at trial. The written confession recorded by the District Attorney and submitted to the jury followed at least four oral confessions to other investigative officers. Therefore it is evident that it was not coerced by the presumed magisterial might of the District Attorney. Further, it has been consistently held through the long series of attacks in this case that the District Attorney was acting only in his investigative role (See Appendix A, pp. 12-13). As to the lack of mental competence of Petitioner this issue was ably presented to the trial jury by counsel and has been, like the other issues, thoroughly reviewed on direct appeal and collateral attack.

The issue of the constitutionality of the procedure of transmission of Petitioner's confession to the jury, if properly before this Court, is more troublesome. This issue was not advanced in Petitioner's lengthy brief to the Court of Appeals and although argued orally before that Court was not treated in that Court's decision.

The New York type procedure of admitting a confession to the jury with instructions to disregard it if they found coercion has been specifically outlawed in *Jackson* v. *Denno*, 378 U.S. 368 (1964). Further, there is strong language in *Johnson* v. *New Jersey*, *supra*, that although certain constitutional claims may in the interest of the orderly administration of justice be applied only to cases not final at the time the constitutional right was announced, "confessions are likely to be highly persuasive with a jury and if coerced they may well be untrustworthy by their very nature",

and would probably give retroactive effect to *Jackson* v. *Denno, supra.*

Under the law then in effect in Puerto Rico the trial judge in the present case had only to find that there was controversy as to coercion. But, after extensive hearing without the jury present, the trial judge specifically found no controversy existed. He stated "the defendant has enough capacity to understand what he signed and was read to him. That's the decision, that there has been no duress and that this man was treated like a lady. The confession of the defendant is admitted in evidence as Exhibit No. 5 of the people." (See page 74 transcript of ~~the~~ Trial attached as Appendix A, hereto). Notwithstanding he subsequently allowed presentation of the same evidence before the jury and gave instructions that they could disregard the confession if they found it had been coerced. Thus the defense had two opportunities to prevail in its contention of coercion and failed both times. Clearly the procedures adopted by the trial court were not so prejudicial to the Petitioner as to necessitate the retroactive application of *Jackson* v. *Denno.*

CONCLUSION

Certiorari should be denied. Petitioner's trial in 1944 was conducted in a scrupulously fair manner according to the law then in effect in Puerto Rico. Concepts of fair trial have altered greatly in the intervening years. *Escobedo* v. *Illinois, supra,* established the principle of right of legal counsel in pre-trial proceedings. *Miranda* v. *Arizona,* 384 U.S. 436 (1966) spelled out the necessity of not only giving a suspect the usual warning against self-incrimination but also of advising that he had the right to consult with an attorney and that if he were indigent, one

would be provided. *Jackson* v. *Denno, supra,* outlawed the procedure of submitting the question of the voluntariness of a confession to the jury. *Griffin* v. *California,* 380 U.S. 609 (1965) prohibited comment on the failure of a defendant to testify.

With the exception of *Jackson,* all have been denied retroactive effect. This Court in *Johnson* v. *New Jersey, supra,* set forth a comprehensive review of the basis on which retroactivity is determined. Reliability and relevance were stressed. In each instance where retroactive application was justified, the Court emphasized that the very integrity of the fact-finding process was involved. This Court in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) said the question of whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. In *Spencer* v. *State of Texas,* 385 U.S. 555 (1967) Chief Justice Warren wrote:

> In all cases where the constitutional doctrine has been retroactively applied, the judgment was made that the procedure found erroneous went to the heart of the fairness of the conviction and raised the danger of convicting the innocent. *See* page 584.

None of the errors cited by the Petitioner meet these criteria. As previously noted Petitioner's trial was conducted fairly according to the law then in effect in Puerto Rico and Petitioner was ably represented by counsel. That the use of the standards of procedure consistently advanced by Petitioner's counsel, and since been found valid by this Court, would have been desirable, is undeniable. However, there is here no real claim of miscarriage of justice, but only of procedural errors.

Here as in *Linkletter* v. *Walker,* 381 U.S. 618 (1965) there are interests in the administration of justice and the integrity of the judicial process to consider. In prosecuting Petitioner before the announcement of the new concepts of justice discussed above, Puerto Rico proceeded according to the then norm and according to law. To require rehearings on this and all similar cases would indeed tax the administration of justice to the utmost.

If conscience hurts at the thought of a person in these circumstances in continued incarceration for a crime he was apparently led into, there is still available to Petitioner the avenues of executive clemency or parole.

For these reasons, we feel the Court of Appeals was right in denying habeas corpus and we respectfully request that certiorari be denied.

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June 30, 1971

APPENDIX

Excerpt From Page 74 of Official Transcript of Trial

Judge: It is alleged as the main reason that this is a preliminary hearing and that the defendant was entitled to counsel. In Puerto Rico, as in California and some other States, there is no statute providing that the defendant is entitled to have an attorney, or a friend or relative in a preliminary hearing. There is not. The defense forgets that the investigation of the prosecuting attorneys is private. As to the mentality of the defendant, the court has already decided and it deems that the defendant has enough capacity to understand what he signed and was read to him. That's the decision, that there has been no duress and that this man was treated like a lady. The confession of the defendant is admitted in evidence, as Exhibit No. 5 of The People.